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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HALLE PROPERTIES, L.L.C., an Arizona limited liability company,

Plaintiff,

v.

TERRY CHANDLER BASSETT and CAROL JENNA BASSETT, Trustees of the Terry Chandler Bassett and Carol Jenna Bassett Revocable Trust dated December 30, 1996; BIG O TIRES, INC. and DOES 1-10

Defendants.

TERRY CHANDLER BASSETT and CAROL JENNA BASSETT, Trustees of the Terry Chandler Bassett and Carol Jenna Bassett Revocable Trust dated December 30, 1996; BIG O TIRES, INC.,

Third-Party Claimant,

v.

MICHAEL V. BARRIERE; KCG PROPERTIES, INC.,

Third-Party Defendants.

CASE NO.: CV 06-7695 ABC (JWJx)

ORDER RE: THIRD-PARTY DEFENDANT RICHARD P. WAXMAN'S MOTION TO DISMISS AND SPECIAL MOTION TO STRIKE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16

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MICHAEL V. BARRIERE; KCG PROPERTIES, INC.,

Third-Party Claimants,

v.

TERRY CHANDLER BASSETT and CAROL JENNA BASSETT, Trustees of the Terry Chandler Bassett and Carol Jenna Bassett Revocable Trust dated December 30, 1996; WAXMAN; MADDALENA REALTY; MR. ROLAND MADDALENA; Does 11-50,

Third-Party Defendants.

Pending before the Court are two motions filed by Third-Party Defendant Richard P. Waxman ("Waxman"), a Rule 12(b)(6) Motion to Dismiss and a Special Motion to Strike Pursuant to California Code of Civil Procedure 425.16 (also known as an anti-SLAPP motion[1]), both filed on July 25, 2007. Third-Party Claimant Michael V. Barriere ("Barriere") opposed these motions on August 6, 2007, and Waxman replied on August 13, 2007. The hearing on these matters is currently set for August 20, 2007, but the Court finds them appropriate for resolution without oral argument. See Fed. R. Civ. Proc. 78; Local Rule 7-15. The Court hereby VACATES the August 20, 2007 hearing date. For the following reasons, the Court DENIES Waxman's anti-SLAPP motion and GRANTS Waxman's Motion to Dismiss WITH PREJUDICE. The Court also DENIES both parties' requests for attorney's fees and costs.

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[1]"SLAPP" stands for "strategic lawsuit against public participation." See Kolar v. Donahue, McIntosh & Hammerton, 145 Cal. App. 4th 1532, 1535 n.1 (2006).

I. FACTUAL BACKGROUND

Although the situation that gave rise to this litigation is complex, Barriere's allegations relevant to resolving Waxman's two motions are straightforward and do not require the Court to resolve any factual conflicts. Defendants Carol Bassett and Terry Bassett, through the Terry Chandler Bassett and Carol Jenna Bassett Revocable Trust (collectively the "Bassetts"), owned real property in the City of Santa Rita, on which they operated (through their wholly-owned company Tire Systems, Inc.) a franchise of Big O Tires, Inc. ("Big O"). The franchise agreement contained a clause that gave Big O the right of first refusal - a 30-day window in which to meet any bona fide offer on the real property and the franchise. Losing money, the Bassetts decided to sell the property and the franchise.

The Bassetts engaged Barriere and Keller Williams Realty, Coastal Valley, to assist in the sale. Barriere located Halle Properties, L.L.C. ("Halle") as a potential buyer for the real property willing to take over the franchise agreement from the Bassetts. Barriere presented the Bassetts with a Commercial/Investment Contract of Sale with Halle, but omitted any mention of Big O's right of first refusal. Instead, the Bassetts signed the contract as it was presented to them and sent a copy to Big O, notifying it of the sale. Big O, however, decided to exercise its right of first refusal. Halle then brought the instant action against the Bassetts and Big O for breach of contract and other claims, and the Bassetts brought cross-claims against Barriere for negligence and indemnity.

Waxman had represented the Bassetts in the acquisition of the property and the Big O Franchise, and the Bassetts again contacted him once in May 2006 with questions on the sale of the property and

franchise, but had no other contact with him until September 2006 when the issue arose regarding Big O's right of first refusal. Barriere sought Waxman's involvement in the sale in May 2006 and alleges that Waxman represented the Bassetts in the course of the sale of the property and franchise.[2] Once Big O exercised its right of first refusal in September 2006, however, the Bassetts did engage Waxman to extricate them from the situation.

Barriere alleges a single claim for implied indemnity against Waxman in these paragraphs of his cross-complaint:

> 7. Third Party Complainants are informed and believe and thereon allege that Richard Paul Waxman ("Waxman") is and was at all relevant times herein an attorney, licensed by the State of California, working with the firm of Wendel, Rosen, Black & Dean, LLP, advising the Bassetts concerning their legal rights and obligations in connection with the sale of the Property, pursuant to the Franchise Agreement by and between Bassetts and Co-Defendant, Big O Tires, Inc. ("Franchise Agreement").
>
> 12. Third Party Complainants are informed and believe and thereon allege that Bassetts consulted their attorney, Richard Paul Waxman ("Waxman"), at the time Bassetts entered into the Listing Agreement with Third Party Complainants, concerning their obligations to notify Big O Tires, Inc. of their intentions to sell and Big O Tires, Inc.'s rights under the Franchise Agreement. Neither the Bassetts nor Waxman ever shared any information with Third Party Complainants, other than the representations set forth in paragraph 11.
>
> 16. The damages which have been alleged and the claims made against Third party Complainants by Bassetts in their Third-Party Complaint, are the legal and proximate result in whole or in part of the acts of Third Party Defendants named herein, and each of them.

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[2]Waxman disputes that he ever represented the Bassetts during the real estate and franchise transaction. This dispute is immaterial to Barriere's anti-SLAPP motion because, as discussed in detail infra, even if he acted as the Bassetts' attorney, none of his alleged actions fall with the anti-SLAPP statute. Further, taking Barriere's allegations as true for purposes of Waxman's motion to dismiss, Barriere cannot state an implied equitable indemnity claim against Waxman as the Bassetts' attorney.

17. As a proximate result of Third Party Defendants' improper acts, Third Part Complainants have been made subject to the Bassetts' Third Party Complaint for damages and attorneys' fees and costs.

(Third-Party Complaint ¶¶ 7, 12, 16-17.)

II. SPECIAL MOTION TO STRIKE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16

A. Legal Standard

California Code of Civil Procedure section 425.16, which provides authority for anti-SLAPP motions, states:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the Plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Code Civ. Proc. § 425.16(b)(1).[3] A SLAPP suit is "a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." Wilcox v. Superior Court, 27 Cal. App. 4th 809, 815 n.2 (1994), disapproved on other grounds, Equilon Enters., LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 68 n.5 (2002). In ruling on anti-SLAPP motions, a court engages in a two-step process. Equilon, 29 Cal. 4th at 67. The defendant bringing the anti-SLAPP motion must first make a prima facie showing that the action arises from an act in furtherance of his or her constitutional rights of petition or free speech with respect to an issue of public concern. Id. ("The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California

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[3]The Ninth Circuit allows litigants to bring anti-SLAPP motions in federal court. See, e.g., United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 971-73 (9th Cir. 1999).

Constitution in connection with a public issue,' as defined in the statute.").

An act in furtherance of a person's right of petition or free speech in connection with a public issue includes:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Civ. Proc. Code § 425.16(e). In deciding whether the cause of action arises from protected activity by the defendant, a court considers the pleadings and the supporting and opposing declarations and documents. See Navellier v. Sletten, 29 Cal. 4th 82, 89-90 (2002).

Once the defendant makes a prima facie showing, the burden then shifts to the plaintiff to establish the probability that he or she will prevail on the stated claims. Equilon, 29 Cal. 4th at 67. Assuming that the defendant meets its initial burden and that the plaintiff fails to show a reasonable probability of success, the complaint or offending cause of action is stricken. Cal. Civ. Proc. Code § 425.16(b)(1). Additionally, the defendant is entitled to recover reasonable attorney's fees as a prevailing party. Cal. Civ. Proc. Code § 425.16(c). As discussed below, the Court finds that Waxman has failed to meet his initial burden to show Barriere's cause of action "arises from" rights protected by the First Amendment, so the Court does not need to analyze whether Barriere will prevail on

the merits of his claims against Waxman. See Jespersen v. Zubiate-Beauchamp, 114 Cal. App. 4th 624, 632 (2004).

In determining whether a claim "arises from" protected activity, the Court must determine whether "the act forms the basis for the plaintiff's cause of action." Kolar v. Donahue, McIntosh, & Hammerton, 145 Cal. App. 4th 1532, 1537 (2006). However, "the mere fact an action was filed after protected activity took place does not mean it arose from that activity." Jespersen, 114 Cal. App. 4th at 630. "The 'arising from' requirement is not always easily met. . . . A cause of action may be 'triggered by' or associated with a protected act, but it does not necessarily mean the cause of action arises from that act." Id. (citations omitted) (emphasis in original). "California courts rightly have rejected the notion that a lawsuit is adequately shown to be one 'arising from' an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself." Id. at 1537-38.

In the context of an attorney-client relationship, the anti-SLAPP statute does not "turn a garden-variety attorney malpractice claim into a constitutional right." Jespersen, 114 Cal. App. 4th at 632. More specifically, "garden variety transactional malpractice . . . does not trigger the protections of section 425.16." Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, 133 Cal. App. 4th 658, 670 (2005) (emphasis added); see also Moore v. Shaw, 116 Cal. App. 4th 182, 195 (2004). Both Moore and Peregrine Funding are particularly instructive in this case. In Peregrine Funding, the plaintiff sued its former law firm for professional malpractice based on two advice letters it drafted on registration of securities long

before any litigation was commenced. 133 Cal. App. 4th at 668. The law firm brought an anti-SLAPP motion, asserting that "plaintiffs' claims arose from the firm's protected speech and 'litigation activity' on behalf of its clients[.]" Id. The court denied the motion, holding that "allegations of wrongdoing pertaining to these advice letters do not concern any petitioning activity by Sheppard on its own behalf or on behalf of a client. The letters were not writings made before a judicial proceeding, or in connection with an issue under review by a court." Id. at 670.

Similarly, in Moore, the plaintiff alleged that his attorney intentionally and negligently participated in the breach of trust by drafting a trust termination agreement she knew would be null. 116 Cal. App. 4th at 190. The attorney brought an anti-SLAPP motion, suggesting that the plaintiff's "causes of action arose from [the attorney's] conduct in representing [her clients] and their exercise of the constitutional rights of freedom of speech and petition for redress of grievances in the context of probate[.]" Id. The court denied the motion, holding that "[t]he act by [the attorney] underlying [the plaintiff's] causes of action was her drafting of the termination agreement to enable George to terminate the [trust] prematurely. That conduct by [the attorney] was not an act in furtherance of the right of petition or free speech, and therefore an anti-SLAPP motion did not lie." Id.[4]

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[4]Barriere's cross-claim for implied indemnity is not a direct claim of malpractice by a client against an attorney. Rather, it involves Barriere's attempt to hold Waxman accountable for his alleged joint tortfeasor status in negligently failing to advise the Bassetts. See California State Auto Ass'n Inter-Ins. Bureau v. Bales, 221 Cal. App. 3d 227, 230 (1990) (stating that when an "injury is caused by two (continued...)

B. Analysis

To demonstrate the free speech and petition nature of his claims, Waxman presents two interpretations of Barriere's "cause of action" for implied indemnity. First, he claims that Barriere's cause of action "is based upon the Bassetts' filing, through Waxman's office, a Third Party Complaint against the Brokers in the underlying action brought by Halle on the Sale Contract." (Mot. at 12:20-23.) Second, he asserts that Barriere "sued Waxman because he had the temerity to advise his clients as to their legal rights with respect to the sale transaction with Halle and with respect to their claims against Brokers set forth in the Third Party Complaint filed by the Bassetts' legal counsel on the Bassetts' behalf." (Id. at 14:23-28.) Neither of these formulations accurately describes the conduct from which Barriere's implied indemnity arises.

Nowhere in Barriere's claims against Waxman does he, at any time, refer to Waxman's advice to his clients regarding any part of this proceeding. Rather, Barriere's cross-complaint clearly alleges an indemnity claim based on Waxman's negligent failure to advise the Bassetts that Big O had a right of first refusal in the sale of the property and franchise. Barriere's indemnity claim is based on Waxman's alleged omission, not on any "writings made before a judicial proceeding, or in connection with an issue under review by a court."

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[4](...continued)
or more tortfeasors, the tortfeasors may claim against each other for implied equitable indemnity."). However, to establish his claim for implied indemnity, Barriere must prove that Waxman was, in fact, negligent in failing to advise the Bassetts about Big O's right of first refusal. Therefore, the decisions relating to attorney malpractice claims in Moore and Peregrine Funding, are directly relevant to the issues here.

Peregrine Funding, 133 Cal. App. 4th at 670. Similarly, Barriere is clearly not alleging a cause of action against Waxman for his "temerity" to advise his clients as to their legal rights. In fact, precisely the opposite is true: Barriere's indemnity claim is based on an alleged failure by Waxman to advise his clients of the right of first refusal clause. Therefore, "it appears that the alleged attorney malpractice did not consist of any act in furtherance of anyone's right of petition or free speech, but [the attorneys'] negligent failure to do so on behalf of their clients." Jespersen, 114 Cal. App. 4th at 631 (emphasis in original).

View in the proper light, Barriere's claim for indemnity in no way "arises from" Waxman's (or his clients') acts in furtherance of free speech or petition rights. As noted above, Barriere bases his claim on Waxman's alleged negligence in failing to advise the Bassetts of Big O's right of first refusal, which is an omission that occurred long before any legal proceedings were initiated and related solely to the real estate and franchise transaction taking place. Like the claims in both Moore and Peregrine Funding, this is a "garden variety" transactional malpractice claim that involves no constitutional rights to petition or free speech. See Moore, 116 Cal. App. 4th at 195; Peregrine Funding, 133 Cal. App. 4th at 671.[5] Therefore, Waxman's anti-SLAPP motion is DENIED and the Court need not consider whether

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[5]Waxman cites City of Santa Monica v. Stewart, 126 Cal. App. 4th 43 (2005) as a case analogous to this situation. However, in that case, the court found that a claim arose from protected activity because it was clear from the facts that the cross-claim was based on the plaintiff's acts in intervening in an earlier litigation. As discussed above, because Barriere's indemnity claim cannot properly be characterized as arising from Waxman's litigation conduct, Stewart is inapposite.

Barriere has carried his burden to prove he will prevail on the merits of his claim.[6]

C. Attorney's Fees

Waxman claims attorney's fees arising from this motion. The anti-SLAPP statute mandates attorney's fees for a party who brings an anti-SLAPP motion that is granted. See Cal. Code Civ. Proc. § 425.16(c) ("[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."). Because the Court denies Waxman's anti-SLAPP motion, he has not "prevailed" and his request for attorney's fees and costs is DENIED.

Barriere claims attorney's fees and costs for having to defend the motion. The anti-SLAPP statute also allows a court to award attorney's fees to a plaintiff defending an anti-SLAPP motion that was "frivolous" or "solely intended to cause unnecessary delay." Id. ("If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion[.]"). Barriere argues that Waxman's motion is "frivolous" because it was not granted. If this were the rule under section 425.16(c), attorney's fees would become automatic for any successful opposition, without regard to the "frivolous" or "intended to cause unnecessary delay" requirements. Waxman's characterization of Barriere's claims was colorable, even if ultimately wrong, and the Court cannot say that "any reasonable attorney would agree that an

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[6]Waxman also asserts a "litigation privilege" under California Civil Code section 47(b). However, the Court rejects this contention because Waxman relies on the same faulty premise that Barriere's indemnity claim is based on Waxman's litigation activities, not on acts undertaken long before litigation was commenced.

anti-SLAPP motion did not lie under these circumstances and that the instant motion was totally devoid of merit." Moore, 116 Cal. App. 4th at 200. Therefore, Barriere's claim for attorney's fees and costs is DENIED.

III. RULE 12(B)(6) MOTION TO DISMISS

A. Legal Standard

In addition to the anti-SLAPP motion, Waxman also brings a motion to dismiss Barriere's cross-claim for indemnity. A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988); accord Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir. 1997) ("A complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'") A court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); see also Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980) (finding that the complaint must be read in the light most favorable to the plaintiff). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast as factual allegations. See Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981); Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 973 (8th Cir. 1968).

Moreover, in ruling on a 12(b)(6) motion, a court generally

cannot consider material outside of the complaint (e.g., those facts presented in briefs, affidavits, or discovery materials). See Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). A court may, however, consider exhibits submitted with the complaint. See id. at 453-54. Also, a court may consider documents which are not physically attached to the complaint but "whose contents are alleged in [the] complaint and whose authenticity no party questions." Id. at 454. Further, it is proper for the court to consider matters subject to judicial notice pursuant to Federal Rule of Evidence 201. See Mir, M.D. v. Little Co. of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988).[7]

B. Analysis

Waxman claims that California public policy precludes Barriere from obtaining indemnity against him for actions he undertook as the Bassetts' attorney. As one California court stated:

> [T]he ordinary rules of implied equitable indemnity in tort do not apply when the claim for indemnity is made against an attorney, is based on a breach of the attorney's duty to his or her client, and is brought by an adverse party in litigation which is the same as or related to that in which the alleged negligence took place. . . . Perceiving that attorneys would be reluctant to accept cases that might result in indemnity claims, and, more significantly, that if faced with a potential indemnity claim, the attorney's sense of self-preservation might impinge on his or her duty of undivided loyalty to the client, these cases have established an exception to the ordinary rule of equitable indemnity.

California State Auto. Ass'n Inter-Ins. Bureau v. Bales, 221 Cal. App. 3d 227, 230 (1990) ("Bales"); see also Major Clients Agency v. Diemer,

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[7]The Court recognizes that, while it may consider matters outside the pleadings to rule on an anti-SLAPP motion, it may not consider evidence outside the Complaint (and not properly subject to judicial notice) to decide Waxman's motion to dismiss. The Court has carefully analyzed Waxman's motion to dismiss with this limitation in mind and has not considered any additional evidence offered by either party in conjunction with the anti-SLAPP motion.

67 Cal. App. 4th 1116, 1130 (1998) (quoting same) ("Major Clients"). Both Bales and Major Clients are directly analogous to the instant case and foreclose Barriere's claim against Waxman.

In Bales, an insured was injured in car accident and engaged the defendant-attorney to sue the plaintiff-insurer. 221 Cal. App. 3d at 229. The attorney failed to vigorously pursue claims on the insured's behalf, and the insured - with new attorneys - sued the insurer for bad faith claims handling. Id. at 230. The insurer cross-complained against the insured's first attorney for implied equitable indemnity for any judgment in favor of the insured. Id. The court dismissed the insurer's cross-claim for indemnity, reasoning that the interests of the insured and the insurer were potentially adverse, and requiring the insured's attorney to indemnify the insurer for any acts undertaken during that representation would divide the attorney's loyalty to his former client. Id. at 231. In that circumstance, the attorney may be forced to act in the interest of self-preservation or in the insurer's interests, to the detriment of the client. Id. ("In effect . . . an attorney would be required to act as advocate not only for his or her client, but also for an adverse party."). Thus, "even the possibility that the attorney might be subject to cross-complaint gives rise to the danger that the attorney will allow his or her advice to be affected by potential personal liability rather than the good of the client." Id. at 233.

Similarly, in Major Clients, a writer hired both an attorney and an agent from the Major Clients Agency to represent him in contract negotiations with a studio. 67 Cal. App. 4th at 1120. The writer then sued the studio over that contract and settled, surrendering a substantial fee entitlement. Id. at 1121. A dispute over fees arose

between the writer and Major Clients Agency, which proceeded to arbitration and settled. Id. Major Clients Agency then filed a claim against the attorney for indemnity based on the attorney's failures during the contract negotiations. Id. Relying on Bales, the court foreclosed Major Clients Agency's implied indemnity claim, finding that, because the agent and the writer were potentially adverse parties in the negotiations, subjecting the attorney to indemnity claims could divide his loyalty to his client. Id. at 1133.

The facts in the instant case are nearly identical to the facts in Bales and Major Clients. As in Bales, where the insurer sought indemnity from the insured's first attorney based on damages in an action between it and the insured/client, and as in Major Clients, where Major Clients Agency sought indemnity from the writer's attorney based on a settlement in an action between it and the writer/client, Barriere is seeking indemnity from the Bassetts' attorney based on claims asserted by Waxman's clients, the Bassetts, against Barriere. This presents the exact situation where Waxman risks dividing his loyalty to the Bassetts: with the threat of indemnity hanging over his head for his alleged actions during the negotiations for the sale of the property and franchise, he may act in his own interests, or even in the interests of Barriere, so as to avoid indemnity liability. Further, as in Major Clients, Barriere and the Bassetts were potential adversaries, and became actual adversaries when Halle Property sued the Bassetts and the Bassetts cross-claimed against Barriere. If required to indemnify Barriere, Waxman would have been required to represent the interests of his clients and an adverse party. Therefore, consistent with Major Clients and Moore, the Court holds that Barriere cannot state a claim for implied equitable indemnity

against Waxman in this circumstance.[8]

Waxman also argues that he owed no duty to Barriere during the transaction at issue and therefore, Barriere can state no other claim against him for failing to disclose the right of first refusal clause in the franchise agreement. An attorney's "duty of care in advising his client [does] not extend to plaintiffs with whom his clients dealt at arm's length in the absence of showing that the advice was foreseeably transmitted to or relied upon by plaintiffs, or that they were intended beneficiaries of a transaction to which the advice pertained." Major Clients, 67 Cal. App. 4th at 1128; see also St. Paul Tit. Co. v. Meier, 181 Cal. App. 3d 948, 951 (1986) ("[A]ttorneys have not been held to a duty of professional care toward adverse parties, toward those parties with whom the client dealt at arm's length, nor in any situation in which the imposition of such a duty would intrude upon the basic attorney-client relationship." (internal citations omitted)). Barriere has not alleged that he was the third-party beneficiary of Waxman's representation of the Bassetts or that he relied on any advice from Waxman during the sale of the property and franchise, nor could he. As noted above, Barriere and the

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[8]Barriere relies on Leko v. Cornerstone Bldg. Inspection Servs., 86 Cal. App. 4th 1109 (2001). However, in Leko, neither of the alleged joint tortfeasors was an attorney, and the court even distinguished Major Clients as a special circumstance where public policy considerations create an exception to implied equitable indemnity when an attorney is sued: "Similar considerations do not apply for an indemnity claim against a home inspection company retained by the purchaser of real property. Inspection companies do not have a privileged, fiduciary relationship with the client, and their reports are not confidential. While a potential indemnity claim could detrimentally affect an attorney's advice to his or her client, it would seemingly enhance the performance of home inspectors by inducing them to be more diligent in discovering and reporting potential defects." Id. at 1117-18.

Bassetts were potentially adverse parties who actually became adverse in this case, which precludes finding that Waxman owed Barriere any duty. See Major Clients, 67 Cal. App. 4th at 1133. Therefore, Barriere cannot assert any claims against Waxman directly for failing to inform him or the Barretts of Big O's right of first refusal.[9]

C. Dismissal with Prejudice

Waxman asks the Court to dismiss Barriere's cross-claim with prejudice. Generally, leave to amend a complaint "shall be freely granted when justice so requires." Fed. R. Civ. Proc. 15(a). However, leave may be denied where "the allegations of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); see also Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988) ("[I]f a complaint is dismissed for failure to state a claim upon which relief can be granted, leave to amend may be denied . . . if amendment of the complaint would be futile.").

Barriere claims that he "can cure any factual defects or deficiencies" by amending his cross-complaint. (Opp. at 7:7-8.) However, as discussed in detail above, the deficiency in Barriere's cross-claim is not factual. As a legal matter, Barriere cannot assert any implied indemnity or breach of duty claims against Waxman. Barriere does not suggest what additional facts he might allege relating to the property and franchise transaction, but whatever they may be, they would be futile to cure the legal deficiency of the cross-complaint. See Albrecht, 845 F.2d at 196 (finding any amendment

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[9]Waxman again argues that the "litigation privilege" in California Civil Code section 47(b) precludes Barriere's indemnity claim. For the reasons stated above, the Court rejects this contention.

futile because they would not repair the legal defect in the complaint). Therefore, the Court dismisses Barriere's cross-claim against Waxman WITH PREJUDICE.

IV. CONCLUSION

The Court hereby DENIES Waxman's anti-SLAPP motion against Barriere. The Court hereby GRANTS Waxman's motion to dismiss WITH PREJUDICE. The Court DENIES both parties' requests for attorney's fees and costs related to these motions.

DATED: August 14, 2007

AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE